(d) for the cancellation or rectification of instruments;

(g) for declaratory decrees except in interpleader proceedings under section 73 of this Ordinance."

Further the applicant states that the collector is not competent to determine whether the respondent is a moneylender or not.

On the other hand, Mr. Leow, for the respondent submitted that the collector is competent to hold the enquiry under section 260 of the National Land Code even though questions involving fraud and moneylending have been raised by the applicant and in support of his submission he referred to a passage in "The Torrens System in Malaya" by S. K. Das at page 86 paragraph 3 which states:

"There is divided opinion as to whether a Collector of Land Revenue should be invested with such wide judicial or quasi-judicial powers as at present. He has power to re-enter land for breach of or default in the observance of conditions express or implied in a title (section 37); to order partition of E.M.R. land and award sums for the purpose of equalising the value of the parts (section 106): to entertain a claim to registration as proprietor of a piece of E.M.R. land (section 107), (which may involve the determination of equitable rights and obligations): to order a sale of E.M.R. (or Mining Lease) on a chargee's application for sale (sections 141 and 142), where questions of great complexity may arise under the Moneylenders Ordinance...."

He also referred to another passage from the same book at page 446, last paragraph which reads:

"The court or the collector must satisfy himself that the chargor has made default and must investigate allegations by him as to payments made by him or non-receipt of full consideration or other issues raised by him, such as the invalidity of the charge under the Moneylenders Ordinance, fraud, forgery, illegality, etc.".

He further submitted that as the words contained in sections 256(3) and 263(1) of the National Land Code are more or less similar and since section 256(3) of the National Land Code confers power on the High Court to deal with applications for sale of land held under registry title involving questions of fraud, illegality, moneylending, etc., then similarly the collector has the same power under section 263(1) of the National Land Code to deal with applications for an order for sale of lands held under E.M.R. involving questions of fraud, illegality, moneylending, etc.

I am however unable to accept the submission of counsel for the respondent on this ground because the Court of Appeal (as it then was) in *Suppiah* v. *Ponnampalam*[1] at page 204 paragraph F states as follows:

"I can, however, find no power which would have enabled him to investigate any allegation of fraud or misrepresentation, and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240."

Next, Mr. Leow submitted that section 37 of the National Land Code does not permit an appeal against the decision of the collector for refusing an application for a postponement under section 28(2) of the National Land Code because section 28 of the National Land Code merely speaks of a "proposed enquiry" whereas section 37 of the National Land Code speaks of an "enquiry". It is his contention that section 37 of the National Land Code only permits an appeal against the decision of the collector made under section 29 of the National Land Code. He further contended that the refusal by the collector to grant the postponement was an administrative act by him in the exercise of his discretion and as such the court will not interfere with it unless it was wrongly exercised in law.

Section 37 of the National Land Code however states that an appeal shall be against any decision or order given in "any enquiry" and by any standard of interpretation I would say the words "any enquiry" would include a "proposed enquiry" stated in section 28(2) of the National Land Code and therefore the applicant is entitled to appeal against the refusal of the collector to grant his application under section 28(2) of the National Land Code for a postponement of the hearing of the enquiry under section 260 of the National Land Code until after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967.

Further the collector has not given any decision for refusing the application other than to say that the court has not made an order stopping him from holding the enquiry. "Decision" in this case is defined in section 418(3) of the National Land Code to include any act, omission, refusal, direction or order. Lastly, I think it is also in the interest of justice that the enquiry should be postponed until after the final disposal of the High Court suit.

The application is therefore allowed with costs.

Application allowed.

Solicitors: *N. Sharma; S. N. Leow.*

GUI HOI CHAM & ORS. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J. (Malaya), Suffian F.J. & Abdul Aziz J.) April 25, 1969]

[Ipoh — Federal Court Criminal Appeal No. X. 17 of 1968]

Penal Code, ss. 34 & 302 — Common intention to commit culpable homicide not amounting to murder — Adequacy of direction to jury — Non-direction — Effect of — Conviction under s. 326 substituted.

Criminal Law and Procedure — Alibi — Defence of — Direction to jury.

The appellants were tried on the following charge: "That you all on 3rd day of January, 1968 at about 5.00 p.m. at 12 m.s. Simpang Goring, Durian Tunggal, in the District of Alor Gajah, in the State of Malacca, in furtherance of the common intention of you all, did commit murder by causing the death of one Low Ah Bah (male) and by reason of section 34 of the Penal Code committed an offence punishable under section 302 of the Penal Code." The first three were convicted of culpable homicide not amounting to murder on the unanimous verdict of the jury and the fourth by a majority of 5 to 2. Each was sentenced to 8 years' imprisonment. They appealed against conviction as well as sentence.

At the trial learned counsel for the defence both in cross-examination and in his address, had made it quite clear that the defence was that there was a fight between two factions and that it was an incredible coincidence for six persons to gather together at the scene of the fight unless they had gone there for a common purpose. The material issue in the appeal was whether the directions given to the jury in the summing-up adequately presented facts which might be regarded as favourable to the case for the defence. As to the fourth appellant, his defence was an *alibi*, supported by his employer, whose evidence was not shaken in cross-examination.

Held: (1) it was not enough that the point had been stressed by counsel in his address to the jury. Non-direction in that regard might have led the jury to ignore or misapprehend the weight of the evidence. In this case on the evidence as a whole it would not be safe to uphold the conviction by reason of the inadequacy of the directions concerning common intention;

(2) where the defence was an *alibi* the jury needed an express reminder that it was not enough to hold that the appellant was guilty merely because of the bare possibility: the jury should have been directed that "they must be satisfied that this defence was unsound before they convicted the appellant.

Case referred to:-

(1) *R.* v. *Finch* (1916), 12 Cr.App.R. 77, 79.

FEDERAL COURT.

S. A. Lingam for the appellants.

Ajaib Singh (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Ong C.J.: The appellants were tried in the High Court at Malacca on the following charge: —

"That you all on 3rd day of January, 1968 at about 5.00 p.m. at 12 m.s. Simpang Goring, Durian Tunggal, in the District of Alor Gajah, in the State of Malacca, in furtherance of the common intention of you all, did commit murder by causing the death of one Low Ah Bah (male) and by reason of section 34 of the Penal Code committed an offence punishable under section 302 of the Penal Code."

The first three were convicted of culpable homicide not amounting to murder on the unanimous verdict of the jury and the last named by a majority of 5 to 2. Each was sentenced to 8 years' imprisonment. This appeal is against conviction as well as sentence.

Five prosecution witnesses related how, by sheer coincidence, each of them came on the scene, an isloated place, far from where they normally would pass on their daily round, either at work or leisure. The first was Low Tam Swee (P.W. 8), who arrived at the spot quite fortuitously but in time to see his brother, the deceased, engaged in a lone battle against 8 assailants. Chu Pau Sing (P.W. 10) and Tai Chau (P.W. 11), also fortuitously, came to be there because it was said that the latter's car happened to break down, while *en route* to a different destination, but so conveniently close to the house of an unnamed friend that they were available to come to the deceased's aid when he was attacked. Chu Chan Sin (P.W. 12) and Wong Ah Kau (P.W. 13) also happened to be passing the spot by bus, so they alleged, and when it came to a certain bus-stop they saw the fight in progress whereupon they alighted to come to their friend's rescue. Of these six persons, including the deceased, two pairs were brothers and all were old friends. P.W. 8, 10 and 11 were assaulted when they joined the fray, P.W. 10 receiving a fairly severe head injury requiring to be sutured in hospital, while P.W. 12 and 13 said that, upon being threatened, they ran away. A few minutes later they all returned, except P.W. 8, and finding the deceased lying unconscious, caused him to be taken to hospital, where the doctor in attendance was given a false impression that the patient's injuries had been caused in a road accident. The man died 6 days later.

The only material issue in this appeal was whether the directions given to the jury in the summing-up adequately presented facts which may be regarded as favourable to the case for the defence. Learned counsel for the defence, both in cross-examination and in his address, had made it quite clear what the defence was, namely, that there was a fight between two factions and that it was an incredible coincidence for six persons to gather together at the scene of the fight unless they had gone there for a common purpose. In our view the point made was a logical and fair inference from the whole of the evidence. It was not enough that this point had been stressed by counsel in his address to the jury. With the greatest respect, we think it was possible that non-direction in this regard might have led the jury to ignore or misapprehend the weight of such evidence. It often takes but little for the entire complexion of a case to change depending on whether a material fact is regarded as of greater or lesser significance or none at all. Thus the jury might well have been reminded that, on the whole of the evidence, the deceased, far from being the lone victim of a dastardly attack by 7 or 8 persons acting in concert — as the summing-up would appear to have conveyed to the jury — was engaged in a fairly even contest which, at one stage or another, involved six persons on one side and no more than 7 or 8 on the other, if the prosecution witnesses were not exaggerating.

Again it might have been pointed out to the jury that the injuries were also evenly shared — two of the accused and two of their opponents had similar head injuries, of which only those of the deceased ultimately proved fatal.

The deceased had lingered on for 6 days before death supervened. The medical evidence showed that serious skull fracture was not diagnosed at all. This would appear to indicate that the outward and visible signs of bodily injury were not conspicuous. This is cause for some reflection. Had there been any *common intention* on the part of his assailants to cause his death, or such injury as was likely to result in his death, it is our view that one should have expected him to have received far more serious visible injuries continued to be inflicted on him even after he was *hors de combat* and at the mercy of his opponents. There was no evidence that he continued to be hit after he fell or disengaged himself from the mêlée.

On the evidence as a whole, therefore, we do not think it would be safe to uphold the conviction by reason of our doubts as to the adequacy of the directions concerning *common intention*. Certainly, a *common intention* to commit culpable homicide not amounting to murder is even more doubtful. The undisputed fact is that, whatever led to the fighting, the combatants had all come to the scene with bare hands. When fighting erupted each one armed himself only with the weapon readily to hand from the same stack of firewood. The blows traded and received showed no undue advantage taken of or unusual cruelty towards the deceased. In the heat of battle it was, of course, difficult to gauge the weight and effect of blows with sticks — the paramount intention being to defend oneself by disabling one's opponents. There was no evidence suggesting otherwise. The non-direction leaves us with gnawing doubts whether the jury might not

have found otherwise when debating the question of common intention.

The jury were left only three possible verdicts, namely, murder, culpable homicide not amounting to murder or not guilty. In the result, the jury not being satisfied to find for either extreme, were left only with the intermediate verdict, which they duly returned. Had they been given the further option of finding the appellants guilty of voluntarily causing grievous hurt by dangerous weapons, an offence under section 326 of the Penal Code, it seems to us that, had the fight been presented with equal regard to the evidence for and against each side, the verdict might well have been for conviction under section 326 instead of section 304 of the Penal Code.

We therefore set aside the conviction under section 304 and substitute therefor a conviction under section 326 of the Penal Code in respect of the first three appellants, whose involvement in the fight was admitted. They are each sentenced to 3 years' imprisonment.

As to the fourth appellant, his defence was an *alibi*, supported by his employer, whose evidence was not shaken in cross-examination. The learned judge said that it was "possible" for him to have left the rubber estate to participate in the fight and then return in time to be observed continuing his work. With respect we do not think this direction was adequate. To a jury composed of laymen, summoned to jury service for the first time, an earlier direction in general terms to be satisfied as to this accused's guilt beyond reasonable doubt would hardly render it superfluous to distinguish between a possibility and a probability so likely that the fact might safely be taken for granted. They needed an express reminder that it was not enough to hold that he was guilty merely because of the bare possibility: the jury should have been further directed that "they must be *satisfied* that this defence was unsound before they convicted the appellant": see *R.* v. *Finch*.[1]

All that was alleged against him was his mere presence. In his case, particularly, evidence of his sharing the common intention was an even more crucial issue which the jury should have been expressly reminded to consider. For these reasons, we would quash the conviction of the fourth appellant.

Order accordingly.

B. H. OON & ORS. v. THE GOVERNMENT OF THE STATE OF PENANG & ORS.

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) February 9, 1970]
[Penang — Federal Court Civil Appeal No. X.23 of 1969]

Land Laws — Land formed by alluvial deposits from the sea — Ownership of — Doctrine of accretion — Onus of proof — Issue of temporary occupation licence to owner of adjoining land — Whether owner estopped from claiming land — Licensee estopped only during the continuance of licence — Evidence Ordinance, 1950.

In this case the appellants asked for a declaration that they were the owners of a piece of land adjoining their land which piece of land they alleged had been formed by slow and imperceptible accretion by alluvial deposits from the sea. The respondents admitted that a strip of dry land above the high water mark had been formed but made no admission as to the manner in which the alluvion was formed. They also raised in their defence the fact that one of the appellants had obtained a temporary occupation licence relating to the piece of land. The appellants were however no longer in possession by virtue of the temporary occupation licence at the time they brought the action.

Held, allowing the appeal: (1) assuming the onus of proof was on the plaintiffs/appellants in this case they had discharged their burden of showing that the alluvion had been formed gradually and imperceptibly;

(2) as the appellants had ceased to be licensees at the time when they brought the action, they were not estopped from questioning the title of the first respondent.

Cases referred to:-

(1) *Musselburgh Magistrates* v. *Musselburgh Real Estate Co.* [1904] Sc.L.R. 247, 252.

(2) *Dukhimoni Dasi* v. *Tulsi Charan* (1912) 13 I.C. 512.

(3) *Attorney-General* v. *Chambers*, *Attorney-General* v. *Rees* (1859) 4 De G.M. & J. 55; 45 E.R. 22.

(5) *Tadman* v. *Henman* [1893] 2 Q.B. 168.

(6) *Terunnanse* v. *Terunnanse* [1968] 2 W.L.R. 1125.

(7) *Rex* v. *Yarborough* 3 B. & C. 91; 107 E.R. 668.

(8) *Gifford* v. *Lord Yarborough* 5 Bing 163; 130 E.R. 1023.

(9) *Hull and Selby Railway* 5 M. & W. 327, 332; 151 E.R. 139, 140, 141.

(10) *Lopez* v. *Muddum Mohun Thakoor* 13 Moo. Ind. App. 467, 473; 20 E.R. 625, 627.

(11) *Rex* v. *Yarborough* 1 Dow & Clark 178; 6 E.R. 491.

(12) *Attorney-General* v. *Reeve* (1884-85) 1 T.L.R. 675, 678.

(13) *Rex* v. *Yarborough* 2 Bligh N.S. P.e. 147; 4 E.R. 1087, 1091.

(14) *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* [1915] A.C. 599, 612.

(15) *Brighton & Hove General Gas Co.* v. *Hove Bungalows Ltd.* [1924] 1 Ch. 372, 392.

(16) *Secretary of State for India in Council* v. *Foucar & Co. Ltd.* (1934) 50 T.L.R. 241, 243; 61 I.A. 28.

FEDERAL COURT.

G. Starforth Hill (*Dr. Ahmad Ibrahim* and *Oh Teik Aun* with him) for the appellants.

Ajaib Singh (Senior Federal Counsel) for the 1st respondent.

V. L. Kandan for the 2nd respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at George Town, Penang, dismissing the plaintiffs' claim for the following declarations:

(1) (a) a declaration that the line of the medium high tide of the sea between the ordinary spring and neap tides from time to time constitutes the westerly boundary of Lot 275 (3) and 275 (1).

(b) a declaration that the first plaintiff is entitled to the fee simple absolute in possession of that part of the alluvion which lies along the westerly extremity of the said two lots and above the line of the medium high tide of the sea between ordinary spring and neap tides.

(c) in the alternative a declaration that the first plaintiff as the owner in fee simple in possession of the said two lots is entitled to free and uninterrupted access to the sea over every part of such part of the alluvion from every part of the said two lots.